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Supreme Court of the United States

OCTOBER TERM, 1955

No. 806

PAUL EDWARD ROWTON, CHARLES FREELAN WHEELER and REUBEN JONES STEPP, Petitioners

v.

UNITED STATES OF AMERICA

Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INDEX

Subject Index

	PAGE
Petition for writ of certiorari	1
Opinion below	1
Jurisdiction	2
Question presented	2
Selective Service Regulations involved	2
Statement of the cases	3
Facts in *Rowton* case	3
Facts in *Wheeler* case	4
Facts in *Stepp* case	5
Reasons for granting the writ	7
Conclusion	23
Appendix A (opinion of Court of Appeals)	24
Appendix B (judgment of Court of Appeals)	27
Appendix C (order denying petition for rehearing)	27

Cases Cited

Bejelis v. United States 6th Cir., 206 F. 2d 354 (1953)	14, 15
Chernekoff v. United States 9th Cir., 219 F. 2d 721 (1955)	7, 18
Davis v. United States 6th Cir., 199 F. 2d 689 (1952)	12, 14, 15
Dickinson v. United States 346 U. S. 389 (1953)	12
Dodez v. United States 329 U. S. 338 (1946)	12
Estep v. United States 327 U. S. 114, 123 (1946)	12, 15
Fabiani, Ex parte E. D. Pa., 105 F. Supp. 139, 147-148 (1952)	15
Gonzales v. United States 6th Cir., 212 F. 2d 71	14

PAGE

Gonzales v. United States
348 U. S. 407 (1955) 12, 14
Kotteakos v. United States
328 U. S. 750, 760-761 ..... 8, 12
Mintz v. Howlett
2d Cir., 207 F. 2d 758 (1953) 18
N. L. R. B. v. Cherry Cotton Mills
5th Cir., 98 F. 2d 444, 446 (1938) 15
Niznik v. United States
6th Cir., 173 F. 2d 328 (1949) 16
Olvera v. United States
5th Cir., 223 F. 2d 880, 882, 883, 884 (1955) 20
People v. Barber
289 N. Y. 378, 46 N. E. 2d 329 23
Peterson v. United States
6th Cir., 173 F. 2d 11 (1949); cert. denied, 337
U. S. 925 ..... 11, 16
Simmons v. United States
348 U. S. 397, 406 (1955) 8, 14
Uffelman v. United States
9th Cir., — F. Supp. — (No. 14780, Jan. 27, 1956) 7
United States v. Dorn
E. D. Wis., 121 F. Supp. 171 (1954) 8
United States v. Fry
S. D. N. Y., 103 F. Supp. 905 (1952); reversed,
2d Cir., 203 F. 2d 638 (1953) 16, 17, 18, 19
United States v. Giessel
D. N. J., 129 F. Supp. 227 (1955) 8
United States v. Graham
N. D. N. Y., 108 F. Supp. 794, 797 (1952) 15, 17
United States v. Jasmagy
N. D. Cal., 132 F. Supp. 547 8
United States v. Kariakin
S. D. Cal., Cr. No. 23221-PH, Jan. 12, 1954 8

PAGE

United States v. Laier
N. D. Cal., 52 F. Supp. 392 (1943) 18
United States v. Peebles
7th Cir., 220 F. 2d 114 (1955) 18
United States v. Peterson
N. D. Cal., 53 F. Supp. 760 (1944) 18
United States v. Pitt
3rd Cir., 144 F. 2d 169 (1944) 11, 16
United States v. Romano
S. D. N. Y., 103 F. Supp. 597 (1952) 18
United States v. Rowton
W. D. Ky., 130 F. Supp. 189, 192 (1955) 1, 16, 18
United States v. Schwartz
E. D. N. Y., — F. Supp. — (March 15, 1956) 8
United States v. Scott
E. D. Wis., 137 F. Supp. 449 (Feb. 1, 1956) 8
United States v. Stiles
3rd Cir., 169 F. 2d 455 (1948) 16, 17
United States v. Strebel
D. Kans., 103 F. Supp. 628 (1952) 17
United States v. Zieber
3rd Cir., 161 F. 2d 90, 92 (1947) 15, 18
Ver Mehren v. Sirmyer
8th Cir., 36 F. 2d 876, 881 (1929) 15
Walker v. United States
6th Cir., 206 F. 2d 354 (1953) 12

OTHER AUTHORITIES CITED

Federal Rules of Criminal Procedure, Rules 37 (b) (2) and 45 (a) 2
Regulations, Selective Service, Section 1604.41 (32 C. F. R. § 1604.41) 2, 11
10 U. S. C. § 1488 20

	PAGE
18 U. S. C. § 3231	2
28 U. S. C. § 1254 (1)	2
50 U. S. C. App. §§ 451-470 (Universal Military Training and Service Act), Section 12 (a)	1
United States Constitution, Amendment VI	10

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No.

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v.

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Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Each petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of conviction of each petitioner by the United States District Court for the Western District of Kentucky for a violation of the Universal Military Training and Service Act.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. 24, *infra*) is unreported. The opinion of the District Court in the *Rowton* and *Wheeler* cases is reported (130 F. Supp. 189). [RR 83a; RW 62a] [1] The *Stepp* opinion is unreported. [RS 29a]

[1] Numbers herein within brackets preceded by "RR" refer to pages of printed record in *Rowton* case. Numbers herein within brackets preceded by "RW" refer to pages of printed record in *Wheeler* case. Numbers herein within brackets preceded by "RS" refer to pages of printed record in *Stepp* case.

JURISDICTION

The judgment of the Court of Appeals was entered in each of these cases on January 10, 1956. (See Appendix B to this petition, page 27, *infra.*) A petition for rehearing was filed and denied on March 7, 1956. (See Appendix C to this petition, page 27, *infra.*) The time for filing this petition for writ of certiorari expires April 6, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

QUESTION PRESENTED

Since the regulations deny the help of legal counsel before the local board but guarantee, in lieu thereof, assistance to registrants by local board advisors, did the local boards deny petitioners procedural due process of law and invalidate each order to report for civilian work in each case by not informing petitioners of the right of assistance by advisors through posting the names of advisors to registrants conspicuously in the local board office as required by Section 1604.41 of the Selective Service Regulations?

SELECTIVE SERVICE REGULATIONS INVOLVED

Section 1604.41 of the Selective Service Regulations (32 C. F. R. § 1604.41) reads:

> "Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at

least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

STATEMENT OF THE CASES

Facts in Rowton Case

Rowton was born on March 28, 1929. He filed a classification questionnaire with Local Board No. 62 at Paducah, Kentucky, on October 10, 1948, showing that he was a student preparing for the ministry. [RR 30a, 31a-32a] He answered that he was doing ministry work part time. [RR 32a] He was graduated from high school. [RR 33a] The conscientious objector blank was signed. [RR 33a] The local board sent him a conscientious objector form. [RR 34a] Rowton returned it. The local board classified him as a conscientious objector. [RR 34a]

Thereafter Rowton, on November 28, 1951, was reclassified I-O. This conscientious objector classification made him liable to perform civilian work to be selected by the local board. [RR 34a]

He requested a personal appearance. [RR 34a] The local board notified him to appear for a personal appearance on December 17, 1951. [RR 34a-35a, 37a] Rowton appeared before the local board on December 17, 1951. [RR 9a] He filed a statement supporting a claim for exemption as a minister. This was accompanied by a certificate of the Watch Tower Bible and Tract Society. [RR 37a-40a, 40a-41a] On December 27, 1951, Rowton filed three additional affidavits. [RR 42a-45a]

He was denied his claim for exemption as a minister so he appealed his case to the appeal board. [RR 45a] He took a physical examination and was found acceptable. [RR 47a-48a] On February 27, 1952, the appeal board classified Rowton in Class I-O. [RR 35a, 46a] He was notified of this classification. [RR 35a]

Rowton attempted to get a reopening of his classification because of a change in status as a minister of religion. He submitted to the local board a certificate that he was authorized to perform the marriage ceremony under the law of Kentucky. [RR 52a-53a] The local board refused to reopen the case. [RR 35a-36a]

The testimony of the clerk of the local board showed that the local board never had complied with the law about advisors to registrants. No notice of the names and addresses of any was posted. [RR 25a-26a] The clerk testified that only if the registrants requested the help of advisors to registrants did she give them the names and addresses of advisors, and then orally. [RR 26a] The petitioner Rowton discovered that there were no advisors posted when he went to the local board, at the instance of his counsel, during the week of the trial. [RR 14a, 25a-26a]

Rowton was ordered to report for civilian work on June 8, 1953. [RR 36a] He reported to the Western State Hospital at Hopkinsville, Kentucky, but refused to do civilian work. [RR 82a-83a] Thereafter he was indicted and prosecuted for such refusal. [RR 1a, 3a-4a]

Facts in Wheeler Case

Wheeler was born on January 6, 1928. He filed his questionnaire with Local Board No. 62, Paducah, Kentucky, on October 10, 1948, and showed he was a student preparing for the ministry. [RW 23a-24a] He answered that he was employed by the Illinois Central Railroad. [RW 24a] He was graduated from high school. [RW 25a] He signed the conscientious objector blank. [RW 26a] The board mailed him a conscientious objector form. [RW 27a] He returned it and was classified as a conscientious objector. [RW 27a]

Thereafter Wheeler was classified I-W, which made him liable for the alternate civilian work as a conscientious objector. He wrote the local board for a personal appearance. [RW 27a] The request was granted and he was notified to appear on December 17, 1951. [RW 27a] He appeared

before the local board on December 17, 1951, and gave evidence. [RW 27a] Following the personal appearance he was reclassified I-O and notified thereof. [RW 27a]

The testimony of the clerk of the local board showed that the local board never had complied with the law about advisors to registrants. No notice of the names and addresses of any was posted. [RW 17a-18a] The clerk testified that only if the registrants requested the help of advisors to registrants did she give them the names and addresses of advisors, and then orally. [RW 17a-18a] The petitioner Wheeler discovered that there were no advisors posted when he went to the local board, at the instance of his counsel, during the week of the trial. [RW 10a, 18a]

Wheeler appealed his case to the appeal board. [RW 31a] He was classified I-O by the appeal board on February 27, 1952. [RW 32a] He was ordered to report for a physical examination and was found to be acceptable on February 3, 1952. [RW 32a-33a]

On April 23, 1953, Wheeler was ordered to proceed to the Central State Hospital at Lakeland, Kentucky, on May 5, 1953, to do civilian work. He reported at the hospital but refused to do work. [RW 28a, 60a] He was thereafter indicted and prosecuted. [RW 1a, 3a-4a]

Facts in Stepp Case

Stepp was born on February 11, 1932. [RS 15a, 19a] He filed a classification questionnaire with Local Board No. 15, Hopkinsville, Kentucky, on February 26, 1951. [RS 15a] He showed that he was a student preparing for the ministry. [RS 17a] His secular employment was that of a termite exterminator. [RS 17a-18a] He certified that he was a conscientious objector to war. [RS 19a] The local board sent the conscientious objector form to him which he returned and filed. [RS 20a] The local board classified him as a conscientious objector. [RS 20a] His classification was I-O. [RS 20a] This classification made him liable for

the performance of civilian work in lieu of induction into the armed forces. [RS 20a]

Stepp appealed by mail. [RS 20a] The appeal board referred the case to the Department of Justice for an appropriate inquiry, hearing and recommendation. [RS 20a] The appeal board, following the receipt of the recommendation, classified Stepp as a conscientious objector, placing him in Class I-O.

The local board, on December 3, 1952, ordered Stepp to report for civilian work. [RS 21a] Stepp reported at the local board on December 15, 1952, as required, but failed to report to the Kentucky State Hospital as directed by the board. [RS 21a] Because there were irregularities in the designation of the place of civilian employment the State Director ordered the local board to start the civilian work procedure all over again. [RS 21a]

On September 29, 1953, the local board ordered Stepp to report at the local board and proceed to the Waverly Hills Sanitorium, Waverly Hills, Kentucky, on October 9, 1953, for the performance of civilian work. [RS 24a-25a] Stepp did not report at the hospital for civilian work, although he did show up at the local board to state that he had not changed his mind about his refusal to do work. [RS 23a] Thereafter Stepp was indicted and prosecuted for such refusal to do civilian work. [RS 1a, 4a-5a]

The chairman of the local board testified that he never heard of an advisor to registrants. [RS 9a] He testified that the board had an appeal agent but not an advisor to the registrants. [RS 8a-9a] He said positively that at no time did the board ever have posted the names and addresses of advisors to registrants. [RS 9a] The chairman of the board testified on cross-examination that when the local board did not satisfy the registrant, then the registrant was referred to the government appeal agent. [RS 8a, 9a, 10a]

Stepp testified that when he reported to the local board for a physical examination on September 2, 1952, there

was not posted the name and address of an advisor to the registrants. [RS 11a, 20a-22a] Stepp later, on October 25, 1954, a few months before his trial, went to the local board. He took along with him his wife, Mary Lou Stepp. They talked with the clerk, Miss Hardin, about whether there were advisors to registrants. [RS 11a-12a] Miss Hardin, the clerk, said: "Maybe you mean the appeal agent." So the clerk at this time gave the name of the appeal agent to Stepp. This was the first time that Stepp was advised of the government appeal agent (who was not an advisor to the registrants contemplated by the regulations). Stepp did not see posted the name of the government appeal agent. [RS 12a] The clerk told Stepp that the appeal agent was probably in Florida because that was where "he spent most of his time." [RS 12a] After searching the walls for the names and addresses of advisors to registrants Stepp and his wife left on October 25, 1954. [RS 12a-13a]

The chairman of the local board testified that, as a result "of his conference with the—your appeal agent," Stepp did not take an appeal. [RS 10a] This was true because this was on October 25, 1954, three years after the case was forwarded to the appeal board on November 7, 1951, and over two years after the appeal board had classified him on June 24, 1952. [RS 20a]

REASONS FOR GRANTING THE WRIT

The court below has decided a question that is in direct conflict with a decision by the Court of Appeals for the Ninth Circuit. (See *Chernekoff* v. *United States,* 219 F. 2d 721 (1955). Compare *Uffelman* v. *United States,* No. 14,780, 9th Cir., Jan. 27, 1956, which is distinguished. There it appeared appellant had assistance of counsel before the board.) The record in the *Rowton* case [RR 20a-25a; RW 13a] shows a small man who was an attorney was denied the right to enter and help Rowton on his personal appearance. The other petitioners were not specifically denied the right to have counsel enter because they did not request it.

The holding is also out of harmony with what this Court held in *Simmons* v. *United States,* 348 U. S. 397, at page 406. (See the quoted part of that opinion at page 14, *infra.*) The holding is also in conflict with *Kotteakos* v. *United States,* 328 U. S. 750, at pages 760-761. For these reasons the writ should be granted.

Whether a denial of procedural due process of law by a local board that fails to advise a registrant of his right to assistance through counsel of the advisors to registrants by not posting notice of the names and addresses of such advisors is an important question which is shown in the conflicting decisions by the district courts on the question. *United States* v. *Dorn,* E. D. Wis., 121 F. Supp. 171 (1954), is typical of several cases holding that failure to give notice of help of advisors is not a denial of due process. *United States* v. *Giessel,* D. N. J., 129 F. Supp. 227 (1955); *United States* v. *Jasmagy,* N. D. Cal., 132 F. Supp. 547 (1955); *United States* v. *Kariakin,* S. D. Cal., No. 23221-PH, Jan. 12, 1954; *United States* v. *Scott,* E. D. Wis., 137 F. Supp. 449 (Feb. 1, 1956); and *United States* v. *Schwartz,* E. D. N. Y., — F. Supp. — (March 15, 1956), held to the contrary or that failure to give notice of names and addresses of advisors to registrants is fatal to draft board orders as a denial of procedural due process of law. See the marked portions of the copies of the unreported decisions by the district courts that are in an envelope accompanying this petition as Appendix D.

This petition presents, as will be hereafter shown, a most important question of federal criminal law which has not been, but which ought to be, reviewed by this Court. The denial of advisor-help by failure to give notice of the right thereto, where help of lawyers is denied, is of wide public or national importance.

The problem is not temporary or limited to just a few cases. There are about four thousand local boards with whom millions of registrants have their cases. Several hun-

dred of these boards have failed to comply with the regulation requiring giving notice of the right to counsel of advisors. Several hundred thousand or millions of registrants are affected by the question here presented.

About six million out of the sixteen million registrants under the Act are entitled to make claims for deferment or exemption from training and service fixed by Congress. A large percentage of these persons are uneducated and few, if any, are skilled in how to properly present and handle their claims before the local boards in this highly complicated field of administrative law, full of technical pitfalls for the registrant. The denial of help by lawyers before the boards has made even more necessary and important the help of the advisors to registrants required by the Selective Service Regulations.

The liberality of the procedural requirement for registrants in making their claim by not penalizing them for not dotting their i's and crossing their t's does not make up for denial of proper advice and assistance in making statements supporting their claims for deferment or exemption. Some affirmative assistance must be given to the registrant so that he can carry the burden placed on him to file papers proving his claim, in order that the rights to exemption and deferment are protected as meant by the Congress that provided for the deferment or exemption.

This help was intended by the regulations to come from the advisors provided by law. Without the help of advisors intended by the law, hundreds of thousands, if not millions, of registrants have been and will continue to be injured. Unless the local boards comply with the law by giving notice of the right to the help of advisors, such right to assistance guaranteed by the regulations is neutralized if not wholly nullified. For the right to mean anything the local boards must inform the registrants in the manner provided by law, which is posted notice.

The inherent nature of the right and the broad scope

of registrants affected by the denial of the right, running into the hundreds of thousands or perhaps millions, make it appear that the problem presented here is not only substantial but is also of great and wide public importance.

During the last decade this Court has granted certiorari and determined scores of cases involving convictions in judicial proceedings where the trial judges failed to advise defendants in criminal cases about their constitutional right to have assistance of lawyers in their trials. In each case the question was considered of great public importance so as to call for granting the writ in all of the cases. The situation in these cases is identical and is equally important. There was a smaller group of persons involved in that line of cases. The administrative failure to give notice of the right to counsel in these cases involves millions of persons.

While there is no constitutional guarantee of the right to counsel in these cases, the regulations do secure the right to assistance of counsel of advisors and also specifically provide that each registrant be notified of the right. Due process of law guaranteed by the Sixth Amendment, therefore, requires in these cases that the assistance guaranteed by the regulations be allowed, or at least that notice thereof be given in the manner provided by law.

It can be seen from this that the Court here has presented to it the identical problem in administrative law that was presented in the scores of cases in judicial proceedings, where it granted writs and where counsel was denied or notice of the right thereof not given in judicial proceedings the same as in these administrative proceedings. Since the problem is identical to that presented in those cases and affects a larger number of persons, it must be seen that it is nationally important enough here in these cases to require the granting of the writ of certiorari.

The court below committed substantial error to the prejudice of petitioners when it held that the failure to comply with the regulation requiring the posting of the names of

advisors to registrants by the local board was a mere technicality and not a denial of procedural due process of law.

All procedural law is "bare technicality." Some of the greatest rights cherished by man are also "bare technicalities." But they are written into the Constitution! This the founding fathers did to prevent prosecutors and judges from taking the rights away from the people by calling them bare technicalities.

An idle waste of time it would be to cite the legion of cases that guarantee the right of litigants, especially defendants in criminal cases, to be represented by counsel. Due process of law requires the appointment of counsel. Those who believe that a defendant entitled to counsel is guilty always say that the failure to appoint counsel is a "bare technicality." But such name calling or the treating of constitutional rights as a mere shell has been condemned. Within the past fifty years scores of convictions have been set aside and judgments declared void on a writ of certiorari in habeas corpus cases because of the failure of judges to observe the command of such "bare technicality."

The multitude of cases invalidating convictions for failure to appoint counsel establish a principle that applies in each of these cases. And it cannot be ducked by the court below through the device of misnaming the substantial right a "bare technicality." The court below has held that the law does not guarantee a registrant the right to be represented by a lawyer in the local board proceedings. (*Peterson* v. *United States*, 6th Cir., 173 F. 2d 11 (1949); cert. denied 337 U. S. 925; see also *United States* v. *Pitt*, 3rd Cir., 144 F. 2d 169 (1944)) In lieu of the right to counsel the regulations have specifically guaranteed the right of assistance by advisors to registrants.—32 C. F. R. § 1604.41.

Assistance by advisors in the preparation of papers is a substantial right. The Court should know that millions of unlearned men need assistance in this highly complicated field of administrative law. Without help from advisors

they are lost in a sea of confusion. The same injurious result, therefore, occurs from the denial of assistance by advisors to registrants as flows from the denial of counsel in judicial proceedings. Yet, in spite of this manifest parallel in the denial of due process, the court below has erroneously held that it is harmless. And that because it is a "bare technicality!" So what? Also is the denial of the right to counsel in judicial proceedings a "bare technicality." The denial of that technicality in a judicial proceeding is denial of due process. By force of the same reason, the denial of the similar technicality in this is also a denial of due process.

The court below said that petitioners defied the law. This is irrelevant. The law gives the registrant the right to defy a draft board order. He can challenge its validity when he is prosecuted for a disobedience of the order. (*Estep* v. *United States,* 327 U. S. 114 (1946); *Dodez* v. *United States,* 329 U. S. 338 (1946)) When it is made to appear, as here, that the draft board has flouted a procedural regulation, the defiance of the order is not unlawful. (*Dickinson* v. *United States,* 346 U. S. 389 (1953); *Gonzales* v. *United States,* 348 U. S. 406 (1955); *Davis* v. *United States,* 6th Cir., 199 F. 2d 689 (1952)) Confronted by this law it is exceedingly difficult, if not impossible, for one to reconcile the following statement of the court below: "In the face of consequences brought about by such defiance, appellants seek to escape punishment by reliance upon a bare technicality to show denial to them of procedural due process of law." (See page 26, *infra.*) This statement of the court below seems to disregard the holdings contrary to it. The above-cited decisions show that a registrant has the right to defy a draft board order when the board has flouted the regulations.

The court below committed reversible error to the prejudice of petitioners when it held that the record failed to show prejudice to the petitioners through the admitted denial of procedural due process by the local boards in

failing to post the names of advisors in the manner required by law.

The court below has found that the local boards did not comply with the law. But the court said that there was no showing of harm to petitioners from the failure to comply with the law. The court says that "nowhere in the record" do appellants show harm from the failure to comply with the law.—See page 26, *infra*.

The short answer to this holding is that the law does not require a showing of harm. The court misconceived the burden of proof in this case. It failed to see that the record showed petitioners complied with the burden. All that the petitioners had to show is what they did show: that the regulation had been violated. Then the burden shifted to the Government to prove by affirmative evidence that they were not harmed. The Government did not come forward with any proof of no harm, as indeed it could not. Harm must be conclusively presumed where there is a conceded violation of the regulations.

To overcome this basic failure of proof by the Government the court below indulged in speculation by saying that the petitioners were not harmed by the failure to post the names of advisors, as required by the regulations. How can it be said that better and more convincing papers would not have been submitted if the petitioners had had the help of advisors? Who knows whether they might have proved a prima facie case of exemption as ministers of religion, had they been given the required help? Perhaps the board would have classified them as ministers. How can the court below, in the absence of affirmative proof from the Government, say that it would have done no good for petitioners to have the help of advisors? The burden was on the Government to show affirmatively facts giving basis for the conclusion the Court below reached through speculation, without any support in the record.

The error of the conclusion reached by the court below can be easily shown by an analogy. Suppose that a defend-

ant were charged with murder. Assume that he were indigent and the trial court failed to advise him of his right to counsel and did not appoint counsel. Let it be said that the undisputed evidence showed the defendant guilty of murder. Then let us consider that the case is before this Court on review by appeal. Could it be said that, though the defendant were guilty, as a matter of law the failure to appoint counsel for him was a "bare technicality" and that "nowhere in the record" did the murderer "actually show" that failure to appoint a lawyer "worked" to his "prejudice in any manner"? Or would the fact that the trial court allowed the defendant in such a hypothetical case to offer all the evidence he wanted to produce cure the failure to appoint counsel? The mere asking of these questions loudly resounds the admitted answer, No! The identical situation exists in these real cases now before this Court. Yet, strangely, the court below reached the directly opposite result.

In *Simmons* v. *United States*, 348 U. S. 397 (1955), at page 406, the Court said that, when a draft board violated the regulations fixing a precise procedure to be followed, it was not necessary to "specify the precise manner in which he would have used the right—and how such use would have aided his cause—in order to complain of the deprivation." Yet the court below on a very similar situation here held just to the contrary.—See also *Gonzales* v. *United States*, 348 U. S. 407, reversing the court below in 212 F. 2d 71; and *Kotteakos* v. *United States* 328 U. S. 750, 760-761.

It is difficult—if not impossible—to see any consistency between the holding by the Court of Appeals that it is necessary to show harm, in addition to the violation of the regulations in these cases, and its failure to hold so in a similar situation involving violation of different regulations. (*Bejelis* and *Walker* v. *United States*, 6th Cir., 206 F. 2d 354 (1953); *Davis* v. *United States*, 6th Cir., 199 F. 2d 689 (1952)) In all three of these cases a procedural regulation prescribing the conduct of the local board was

considered. In none of them did the record affirmatively show harm, nor did the court below hold that it was necessary to prove harm or prejudice to the appellant.

It is fundamental that, when a violation of a procedural right is established, harm is presumed. And it is unnecessary, moreover, for the person showing the violation to show any affirmative evidence of injury.

There is a great difference between the scope of review for the purpose of upsetting a classification by a draft board and the scope of review of the determination of some other administrative agency. The scope of review permitted in draft cases is limited to that allowed in deportation cases. (See the cases cited in footnote 14 of the *Estep* case, 327 U. S. 114, 123 (1946).) Notwithstanding this limitation placed on the judicial review of a classification, the fact remains that procedural due process of law must be strictly adhered to. In fact, the rule is stated in *N. L. R. B.* v. *Cherry Cotton Mills,* 5th Cir., 98 F. 2d 444, 446 (1938), as well as many other cases, that where the scope of review is very narrow and restricted, then the need for an insistence on strict compliance with the procedural regulations must be followed even in draft cases. (See *Ver Mehren* v. *Sirmyer,* 8th Cir., 36 F. 2d 876, 881 (1929), and *United States* v. *Zieber,* 3rd Cir., 161 F. 2d 90, 92 (1947).) These cases hold that there must be a full and strict compliance with the procedural regulations. There are many other cases involving procedural violations that prove this rule. For the final order to be valid the local board must strictly comply with the procedural requirements.—*Ver Mehren* v. *Sirmyer,* 8th Cir., 36 F. 2d 876, 881 (1929); *United States* v. *Zieber,* 3rd Cir., 161 F. 2d 90, 92 (1947); Ex parte *Fabiani,* E. D. Pa., 105 F. Supp. 139, 147-148 (1952); *United States* v. *Graham,* N. D. N. Y., 108 F. Supp. 794, 797 (1952); *Bejelis* v. *United States,* 6th Cir., 206 F. 2d 354, 358 (1953); *Davis* v. *United States,* 6th Cir., 199 F. 2d 689 (1952).

Under the law the petitioners were not entitled to be

represented by counsel before the local board. (*United States* v. *Pitt*, 3rd Cir., 144 F. 2d 169 (1944); *Peterson* v. *United States*, 6th Cir., 173 F. 2d 11 (1949); *Niznik* v. *United States*, 6th Cir., 173 F. 2d 328 (1949)) The right to be represented by counsel is a vital right. The Selective Service Regulations provide for the vital right of assistance of advisors to registrants in lieu of representation by counsel. This right is a very important one.

In order that the right be made legally available it was necessary for petitioners to have notice. The board was required to give notice. This necessary notice was not actual notice. It was constructive or posted notice. Constructive notice when required to be given is actually as important as actual notice. For instance, if a statute requires notice by publication and this notice is not given, then the proceedings requiring such notice are void. Conspicuous posted notice at the board's office would have been necessary to give actual notice to the registrants.

It was illegal for the local board to follow the policy of not posting the notice and then not giving actual notice unless the registrants first requested the names of advisors. Posted or constructive notice by posting the notice of the assistance of advisors conspicuously in the local board's office is the very least that the local board could do in order to make up partially for the denial of legal counsel. It is a violation of due process of law not to give actual notice when it is required by the regulations. (*United States* v. *Fry*, 2d Cir., 203 F. 2d 638 (1953); *United States* v. *Stiles*, 3rd Cir., 169 F. 2d 455 (1948)) Where the statute requires constructive notice or posted notice, then the failure to give that type of notice is equally fatal.

The holding by the trial court in the *Rowton* case about waiver of the right because no request for advisors was made by petitioner is error. [130 F. Supp. 189, 192; RR 88a] The law does not require a request or make it a condition precedent to the posting of the name nd addresses of advisors to the registrants by the local board. It is not a

question involving a request. This is a notice that is required by law regardless of whether there is a request or not.

In another instance it is required of the local board that a registrant be sent a notice of classification, Form 110, following his personal appearance before the local board. The law requires this to be done, and if it is not done and the individual is brought to trial, the failure to send him notice is positive grounds for acquittal. The following authorities are positive concerning this matter when the local board omits this notice required by law: *United States* v. *Stiles,* 3rd Cir., 169 F. 2d 455 (1948); *United States* v. *Fry,* 2d Cir., 203 F. 2d 638 (1953); *United States* v. *Graham,* N. D. N. Y., 108 F. Supp. 794 (1952); *United States* v. *Strebel,* D. Kansas, 103 F. Supp. 628 (1952). No court has ever held that because the registrant did not request notice of classification he waived notice of classification. If a registrant does not waive actual notice, then by force of the same reason he does not waive constructive notice by not requesting it.

The law put the first move on the local board. The local board had to give notice first. It was obliged to give the notice regardless of whether it was requested. This requirement to give notice applies not only when the law requires actual notice but also when the law requires constructive notice. The failure to request the names of the advisors is entirely irrelevant and immaterial. It would be reversing the law and putting the responsibility upon the registrant instead of upon the local board, where the law put it. The rule announced by the court below is in effect a complete repeal of the law requiring constructive notice. If the law required registrants to ask for the names of advisors it would have said that registrants were required to ask for them. Since the regulations do not provide that the registrants must request the names of advisors, then it cannot be written into the law by the district court. The holding of the court was an innovation. The invention was wholly unauthorized. In fact it constituted a repeal of the law.

The cases hold that *de novo* classification by the appeal board does not cure a denial of procedural due process by the local board. (*Chernekoff* v. *United States*, 9th Cir., 219 F. 2d 721 (1955); *United States* v. *Zieber*, 3rd Cir., 161 F. 2d 90 (1947); *United States* v. *Peebles*, 7th Cir., 220 F. 2d 114 (1955); *Mintz* v. *Howlett*, 2d Cir., 207 F. 2d 758 (1953); *United States* v. *Laier*, N. D. Cal. S. D., 52 F. Supp. 392 (1943); *United States* v. *Peterson*, N. D. Cal. S. D., 53 F. Supp. 760 (1944); *United States* v. *Romano*, S. D. N. Y., 103 F. Supp. 597 (1952)) It cannot be said that because an appeal was taken in each case and the appeal board reclassified the registrants the denial in this respect was cured.

The district court below in its opinion [130 F. Supp. 189, 192; RR 88a] attempted to distinguish *Chernekoff* v. *United States*, 9th Cir., 219 F. 2d 721 (1955). The court said that that case involved a I-A classification where the appellant was not given a résumé of the adverse information. That part of the *Chernekoff* opinion dealing with failure to give a résumé of the adverse information related to the procedure in the Department of Justice after the case had reached the appeal board. The failure to post the notice of names of advisors in the local board had no relevance at all to that question. When the Department of Justice failed to give a summary Chernekoff had only had his hearing in the local board and had only taken an appeal. The Court of Appeals in the *Chernekoff* case did not attempt to base its holding on the failure to post names of advisors on the happenings in the appeal board after Chernekoff was entitled to notice of advisors. Chernekoff was entitled to have advisors while his case was before the local board and not the appeal board. The court held that he had been denied procedural due process because he was improperly advised before the local board. The attempt to distinguish the *Chernekoff* case by the court fails.

The district court below in *United States* v. *Rowton*, 130 F. Supp. 189, 192 [RR 89a], cites *United States* v. *Fry*, S. D. N. Y., 103 F. Supp. 905 (1952). This decision was

reversed in *United States* v. *Fry*, 2d Cir., 203 F. 2d 638 (1953).

Notice required in law is *notice*. Constructive notice or posted notice is no less a requirement than actual notice. When posted notice is required to be given there must be actually as strict a compliance with this requirement as when actual notice is given.

The district court stated in the *Stepp* case that there was "no evidence in this record that the defendant at any time sought the counsel or advice of an advisor to registrants or that he could have profited from it." [RS 31a] The court then goes on to hold that he had the assistance of certain ministers in the congregation of Jehovah's Witnesses at Hopkinsville in the preparation of his questionnaire and his conscientious objector form. [RS 31a] The court then says that Stepp took no interest in an advisor to registrants until a few days before trial. [RS 31a-32a]

The fact that Stepp may have had some assistance from lay advisors and ministers of Jehovah's Witnesses in no sense of the word excuses the board from doing its duty. The law required the board to post the names and addresses of advisors to registrants. The fact that some layman may have assisted Stepp was not equal to the posting of names of advisors to registrants. That Stepp went to the board to make sure that they did not have posted the names of advisors to registrants a few weeks before his trial is in no way relevant. It merely proves that the local board, as testified by the chairman at the trial, did not have posted the notice required by the regulations.

The court says that Stepp "did not seek and apparently did not desire" at the time his case was before the local board the assistance of advisors to registrants. [RS 32a] It was not necessary for him to seek or desire the assistance of advisors to registrants at that time. The issue is not whether he requested, needed or desired the help of advisors to registrants. The question of law is whether the

draft board denied procedural due process of law by not taking the step required by law in posting the names of advisors to registrants.

The district court says that Stepp did not prove that "he could have profited" from the posting of names of advisors to registrants. [RS 31a] It is not, as shown above, necessary to prove or show that petitioner was injured by the local board's failure to post notice of names of advisors. When the board violated the express provision of the regulations this was sufficient.

The case here is similar to the denial of counsel in court martial proceedings. The regulation here, like 10 U. S. C. § 1488, is a statutory guarantee of help of counsel. The denial here is the same as the denial of counsel in court martial proceedings.

In *Olvera* v. *United States*, 223 F. 2d 880 (1955), the Fifth Circuit held that there must be a strict compliance by the local board with all procedural requirements. Chief Judge Hutcheson said, among other things, as follows:

> ". . . Under this principle, it is of the essence of the validity of board orders and of the crime of disobeying them that all procedural requirements be strictly and faithfully followed, and that a showing of failure to follow them with such strictness and fidelity will invalidate the order of the board and a conviction based thereon. (Page 882)
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> • • •
>
> ". . . So strongly does this stand out in the four cases just decided, that they may be said to be a new Magna Charta of liberties in conscientious objector cases, a turning back from conviction by administrative absolutism to conviction only in accordance with the tradition of due process and the law of the land for which the Milligan case stands in our jurisprudence like a beacon set upon a hill:

"'• • •The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct, to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crime, except in case of impeachment, shall be by jury"; and in the fourth and sixth articles of the amendments. • • •' Ex parte Milligan, 71 U. S. 2, at page 119. (Pages 882-883)

• • •

"When all is said and done, what is in question in these and other like cases is that reconciliation of law with liberty, which distinguishes a government of laws from one of men. Therefore, in construing and applying the Selective Training & Service Act in conscientious objector cases, these things must be kept in mind: (1) the statute under construction is a statute of religious liberty; (2) the blood of the martyrs is the seed of the church; and (3) liberty and law must go hand in hand, neither must outrun the other. (Page 883)

• • •

> "As long, therefore, as the law stands as it is now written and construed, it is and will continue to be of the first importance that the predicate for such conviction without trial by jury be at the least laid with the utmost fidelity not only to every substantial safeguard and right which the law has accorded the objector but also to the procedural requirements compliance with which is essential to the validity of board orders." (Page 884)

Remarkable it is that scarcely any person undertakes to defend the method of trying defendants charged with failing to comply with an administrative order without insisting that this is a measure of judicial convenience, that those who fail to comply with the rule are to be regarded as the "domestic rebels" of medieval times with no rights under the law or Constitution, and that the crime is of such an odious nature that it has worked a forfeiture of even those rights that peculiarly belong to criminals. It is noticed that the Constitution guarantees one charged with treason, the highest crime, a right to counsel. It is said that petitioners who refused to comply with the administrative determinations and orders here are nothing more than criminals and do not need counsel of advisors. It may, for the sake of argument only, be conceded that they are such. Are they not, as such, entitled to the benefit of all the laws made for criminals? If not so, who, may it please the Court, are entitled to the benefit of the laws made for criminals? If the innocent have no use for them, and if the guilty have no claim on the rights conferred by these laws, then they are nullities.

The founding fathers were wise men and they labored in their day for the good of their race and posterity. They enjoyed peculiar advantages for the work that fell to their lot. They had been tried in the school of adversity. They had felt the rod of the tyrant, and knew what oppression was. It was their mission to protect their people, who were

few and weak, against the many and the strong, and to establish fitting guards for liberty under all circumstances. The mission of the present generation is different. The people and the courts are to restrain the excessive indulgence of their own power. They are to hold back the revengeful career of a victorious party, and resist the tempting occasion of becoming tyrants themselves. They are to be generous to the fallen and just to liberty and to mankind. They have no bulwarks to erect for freedom. They need only preserve and defend such bulwarks as they have.

In conclusion, let this Court consider the words of the New York Court of Appeals in another case involving one of Jehovah's Witnesses. It was stated in the concluding part of the opinion in *People* v. *Barber*, 289 N. Y. 378, 46 N. E. 2d 329, as follows: "We conclude this opinion by a quotation from that brief: 'It may seem to some that appellant's activities were of such a character that, at this critical period in world history, the Courts and the Bar need not be particularly concerned with their repression. . . . Each case of denial of rights to an individual or to a small minority may seem to be relatively unimportant, but we know now, more surely than ever before, that callousness to the rights of individuals and minorities leads to barbarism and the destruction of the essential values of civilized life.'"

CONCLUSION

The petition for writ of certiorari should be granted for the reasons above stated.

Respectfully submitted,

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March, 1956.

APPENDIX A

OPINION

(Filed January 10, 1956)

Nos. 12533, 12534, 12565

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL EDWARD ROWTON,
Appellant,
No. 12533 v.
UNITED STATES OF AMERICA,
Appellee.

CHARLES FREELAN WHEELER,
Appellant,
No. 12534 v.
UNITED STATES OF AMERICA,
Appellee.

REUBEN JONES STEPP,
Appellant,
No. 12565 v.
UNITED STATES OF AMERICA,
Appellee.

APPEAL from the United States District Court for the Western District of Kentucky.

Decided January 10, 1956.

Before SIMONS, Chief Judge; ALLEN and MARTIN, Circuit Judges.

PER CURIAM. These cases consolidated for hearing on appeal, were tried separately in the United States District Court for the Western District of Kentucky. Each of the

cases was tried to the court without the intervention of a jury and resulted in a verdict of guilty and a sentence of imprisonment for three years for violation of the Universal Military Training and Service Act of 1948 (50 U. S. C. A. Sec. 462). The first two cases were tried by District Judge Shelbourne and the third by District Judge Brooks. Each of the three cases follows the same pattern of material facts.

Each appellant was classified as a conscientious objector (I-O) by his local board; but each contested that classification, claiming to be a minister and therefore entitled to a classification which would exempt him from induction into the armed forces and from performance of civilian work of national importance. After appealing the local board's decision to the appeal board without avail, each of the three registrants refused to do civilian work in lieu of induction when ordered to do so by his local board.

After their classification as conscientious objectors, Rowton and Wheeler appeared before their respective local boards giving further evidence as to their claimed ministerial status in Jehovah's Witnesses. The local boards ordered the I-O classification retained in both cases. Stepp did not make a personal appearance before his local board to contest the classification, but relied on material in writing which he submitted to support his claim to ministerial status as a Jehovah's Witness. In the Stepp case, the appeal board preliminarily determined that Stepp was not a conscientious objector and referred the case to the Department of Justice. On recommendation of that department, Stepp was classified as a conscientious objector (I-O) by the appeal board.

Appellants were subsequently ordered to report to various state hospitals in Kentucky to perform civilian work of national importance in lieu of induction. Rowton and Wheeler reported to the hospitals designated for them, but refused to work. Stepp refused opportunities given him by his local board to choose the type of work he was willing to do, or the location where he might do it. He informed

his local board by letter and in person that he refused to do any civilian work of national importance in lieu of induction. Separate indictments, trials and convictions of the appellants followed.

The main contention of appellants on appeal to this court is that they were denied procedural due process of law, in that their local boards failed to post the names of advisors to registrants in the local board office as required by Section 1604.41 of the Selective Service Regulations. Appellants claim that this failure invalidates the whole process of their classification, including their orders to report for civilian work, and their subsequent prosecutions and convictions.

Nowhere in the record do appellants actually show that the failure of the local boards to post the names of advisors worked to their prejudice in any manner. Each was afforded ample opportunity to present evidence in support of his claim to exemption from service of any kind due to ministerial status; and each did so. The local boards and the appeal boards decided that appellants were entitled only to the classification of "conscientious objector."

Appellants defied the authority of the United States of America to require that persons, protected in their religious rights as conscientious objectors, be called upon to do work of national importance in lieu of induction into the armed forces. In the face of consequences brought about by such defiance, appellants seek to escape punishment by reliance upon a bare technicality to show denial to them of procedural due process of law.

The failure of the local board to post the names of advisors to registrants as required did not operate to the prejudice of these appellants. [28 U. S. C. A. Sec. 2111; Fed. Cr. Proc. (Titl. 18) Rule 52(a).] They were not denied a fair and reasonable opportunity to present their claims.

The judgments of the United States District Court are affirmed.

APPENDIX B

JUDGMENT

(Same in each case.)

(Filed January 10, 1956)

Appeal from the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the jugdment of the said District Court in this cause be and the same is hereby affirmed.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

(Same in each case.)

(Filed March 7, 1956)

The petition for rehearing is denied.

INDEX

Cases Cited

	PAGE
Gonzales v. United States 348 U. S. 407, 417 (1955)	3

Other Authorities Cited

Regulations, Selective Service (1940 Act) (32 C. F. R. § 601.5 *et seq.*)	
Section 603.41	2, 3
Section 621.6	2
Regulations, Selective Service (1948 Act as amended) (32 C. F. R. § 1602 *et seq.*)	
Section 1604.41 (E. O. 9979, 13 F. R. 4179)	3, 4, 6
Section 1604.41 (amended Jan. 31, 1955, E. O. 10594, 20 F. R. 735)	2, 5
Section 1604.71	4
Section 1604.71 (d) (5)	4
50 U. S. C. App. §§ 301-318 (Selective Training and Service Act of 1940)	3
50 U. S. C. App §§ 451-470 (Universal Military Training and Service Act)	3
Section 1 (c)	3

Supreme Court of the United States

OCTOBER TERM, 1955

No. 806

PAUL EDWARD ROWTON, CHARLES FREELAN WHEELER and REUBEN JONES STEPP, Petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM SUPPLEMENTING PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

When the petition in these cases was prepared, three points were overlooked that ought to be drawn to the attention of the Court. They are (1) the historical background in the Selective Service System for the appointment of advisors to registrants, (2) the argument of the Government of the availability of the government appeal agent and the members of the local board to assist registrants as grounds for denial of the assistance of advisors (which

point was argued by the Government in the courts below but not passed upon), and (3) the amendment of the regulation (32 C. F. R. § 1604.41) so as to change the word "shall" to "may" (Executive Order 10,594, Jan. 31, 1955, 20 F. R. 735).

I.

The first regulation establishing advisors to registrants was published in Executive Order No. 8545, on September 23, 1940. These regulations required an advisory board to be composed of three lawyers, with the chairman being a judge of a county court or a court of similar jurisdiction whenever possible. Paragraph 145 of this Order stated that these boards shall "insure that advice and assistance in preparing questionnaires, claims, etc. are readily available to every registrant." Paragraph 321 provided that Advisory Boards would help registrants fill out questionnaires, and the local boards should request newspapers to publish full information about the advisory boards. It provided, in addition, that registrants who asked the local boards for advice or assistance should be directed to the advisory board. Paragraph 513 provided that members of the advisory board should serve without compensation.

By amendment effective December 9, 1940, the duties of the advisory board were further defined "to insure that advice and assistance in preparing questionnaires, claims, or other papers which will serve as a basis for classification are readily available to every registrant."

These original regulations were numbered to conform with the requirement of publication in the Federal Register on February 1, 1943. On that date paragraph 145, as amended, was renumbered as section 603.41, and paragraph 321 was renumbered Section 621.6 of the Selective Service Regulations. Amendment No. 318, effective July 6, 1945, deleted section 621.6 in its entirety because it had served its purpose. In the printing of the regulations which went into effect on July 31, 1945, Section 603.41 was fur-

ther amended to provide that "advice and assistance in preparing Selective Service questionnaires (Form 40), claims, or other papers which will serve as a basis for classification . . ." Amendment 418, effective January 8, 1947, deleted Section 603.41 in its entirety for the reason that the appointment of advisory boards for registrants was no longer considered necessary.

In 1940 the selection and drafting of men for military service was a system which had not been necessary for some 22 years. Since the public generally was totally unfamiliar with their duties and responsibilities, the 1940 Advisory Boards fulfilled a very real need in furnishing accurate information to the registrant. As can be seen from this brief history, these Boards carried out their mission successfully. In January 1947, when the Selective Training and Service Act of 1940 expired, the Advisory Boards themselves were discontinued.

When the 1948 Act (50 U. S. C. App. §§ 451-470) was passed the President promulgated Section 1604.41 of the Selective Service Regulations (32 C. F. R. § 1604.41, E. O. 9979, 13 F. R. 4179). (See pages 2-3 of the petition.) This regulation was to provide for assistance of advisors in preparing papers to be filed with local boards by registrants in the same manner as the registrants under the 1940 Act (50 U. S. C. App. §§ 301-318). The history shows that the purpose in having advisors was real and practical and necessary in order that the selection of registrants would be fair and just.—62 Stat. 605, 50 U. S. C. App. § 451 (c); *Gonzales* v. *United States,* 348 U. S. 407, 417 (1955).

II.

When a registrant is given his final classification by the local board he is mailed a notice of classification (SSS Form No. 110). On this card it says that for advice see the government appeal agent. The Government in the

courts below argued that this notice of help by the government appeal agent was adequate in lieu of help by advisors provided in 32 C. F. R. § 1604.41.

Section 1604.71 of the Selective Service Regulations (32 C. F. R. § 1604.71) provides for the duties of the government appeal agent. Section 1604.71 (d) (5) requires that the government appeal agent protect "the interests of the Government and the rights of the registrant in all matters." The government appeal agent, however, is not the official prescribed by law to assist the registrants *before the local board.* He has an altogether different duty. He is required to assist the registrants only before the appeal board; he is required to help the registrants take their appeals.

His assistance and notice of it come into play only after the registrants have lost their cases before the local board. Before local board action no notice of such help was given. Any notice that they get later is entirely too late. The principle that a *de novo* appeal board classification does not cure a local board denial of procedural due process also would apply in the giving of help by a government appeal agent in the preparation of appeal papers and the availability of such belated help by him.

The regulations specifically provide for the help of advisors to registrants in matters pertaining to the fixing of forms and the preparation of papers to be filed with the local board. All this help comes long before the appeal agent gets into the picture. What is the sense of having advisors to registrants if the availability of the government appeal agent after the local board denial makes harmless the failure to give the assistance of advisors? The position the Government takes about the help of the government appeal agent makes vestigial the provision for the help of advisors to registrants. The availability of the help of the government appeal agent does not strike

out the assistance of advisors to registrants prescribed by the regulations.

The Government also argued in the courts below that the local board members were available to render assistance. This statement is unsupported by any proof. The local board members are not required by law to render assistance to the registrants. That is why the regulations prescribe advisors to registrants. Local board members are always busy at all times with hearings and consideration of cases. They have no time at all available to help registrants prepare their papers. It is contrary to public policy for the judge of a tribunal to act as counsel. Such would be the case if local board members were required to assist registrants. Advisors have been provided by law so that the inconsistency and burden of assisting registrants would not fall upon the members of local boards.

III.

The regulation (32 C. F. R. § 1604.41) was amended on January 31, 1955 (E. O. 10594, 20 F. R. 735), whereby the appointment of advisors was changed. The word "shall" was changed to "may." The amendment of the regulation did not do away with the appointment of advisors altogether. The amended regulation makes the appointment discretionary with the Director of Selective Service. This does not mean to say that advisors are not still being appointed. Indeed they are being appointed and, if, as and when appointments are made, the responsibility of the local boards is still the same. The regulation still makes mandatory, by the use of the word "shall," that the local boards post the names and addresses of advisors to registrants. The question is by no means moot. The importance of the question and the large number of people affected by it have not diminished any by the amendment. These cases are still important and the question is one that will continue to arise in the future because there are outstanding hundreds of orders of the Director of Selective Service

appointing advisors to registrants under the Selective Service Regulations.

Section 1604.41 of the Selective Service Regulations (32 C. F. R. § 1604.41) (as it existed at the time of these cases) provides that advisors to registrants "*shall* be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms." (Emphasis added.)

The duty on the part of the Director of Selective Service in these cases is mandatory. Under the regulations it is the duty of the State Director to recommend the names of advisors. Since the duty of the Director of Selective Service is mandatory, he is required to call upon the State Director to recommend the names of advisors to registrants for appointment. The duty of the Director of Selective Service does not hinge upon the recommendation of the State Director (who is his subordinate). The regulation does not say that the Director of Selective Service shall appoint advisors *if* a recommendation is made by the State Director. The regulation does not read "in the event of" such recommendation by the State Director. The use of the words "upon recommendation" is merely to the State Director to recommend to the Director of Selective Service the names of advisors. The appointment of advisors is mandatory upon the Director of Selective Service and does not hinge upon the discretion or whim of the State Director under the words "upon recommendation" used in the regulation.

The Court should bear in mind that the regulation in this case, providing for the appointment of advisors to registrants, is a nationally uniform law. It was promulgated by the President, to be followed in all of the states, possessions and territories of the United States. If the argument is accepted, that the carrying out of the presidential mandate is not mandatory upon the Director of

Selective Service, but is contingent upon the "recommendation" of the State Director, then the law will not be uniform. It will be different according to the judgment, thoughtfulness or whim of the different State Directors. There would be no uniformity in the carrying out of the law. The regulation uses the word "shall," which is synonymous to "must." The regulation puts a mandatory obligation upon the Director of Selective Service to make the appointments throughout the entire United States. To accept the contention that the mandatory requirement becomes effective only at the discretion of the State Director is to stultify the use of the word "shall" in the regulation.

CONCLUSION

For the reasons stated in the petition and in this supplemental memorandum the petition for writ of certiorari in these cases ought to be granted.

Respectfully submitted,

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March, 1956.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Regulations involved	2
Statement	4
Argument	11
Conclusion	14
Appendix	15

CITATIONS

Cases:	
Chernekoff v. *United States*, 219 F. 2d 721	13
Eagles v. *Samuels*, 329 U. S. 304	12
Uffelman v. *United States*, No. 14,780, decided January 27, 1956	13, 15–28
United States v. *Davidson*, 218 F. 2d 609	12
United States v. *Dorn*, 121 F. Supp. 171	14
United States v. *Manns*, unreported, decided October 1955, appeal pending C. A. 7	14
United States v. *Mekolichick*, unreported, decided September 29, 1955	14
United States v. *Montee*, 137 F. Supp. 381	14
United States v. *Thoman*, unreported, decided October 1955, appeal pending C. A. 7	14
United States v. *Wenner*, 134 F. Supp. 447	14
Regulations:	
Selective Service Regulations, E. O. 9979, 13 F. R. 4177; 14 F. R. 5021:	
Section 1604.41	2, 11
1604.71	3
Miscellaneous:	
E. O. 10594, 20 F. R. 235	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 806

PAUL EDWARD ROWTON, CHARLES FREELAN WHEELER, AND REUBEN JONES STEPP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 24–26) is reported at 229 F. 2d 421. The *Wheeler* and *Rowton* opinions of the District Court (R. R. 83–91; W. R. 62–71)[1] are reported at 130 F. Supp. 189; the opinion of the District Court in *Stepp* (S. R. 29–32) has not been reported.

JURISDICTION

The judgments of the Court of Appeals were rendered on January 10, 1956 (Pet. 27) and a

[1] There is a separate record for each case. The symbol "R. R." refers to the *Rowton* record; "W. R.", to *Wheeler;* "S. R.", to *Stepp.* The Court of Appeals opinion covers all three cases.

joint petition for rehearing was denied on March 7, 1956 (Pet. 27). The petition for a writ of certiorari was filed on March 29, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the failure of the local selective service boards to post a list of advisors to registrants constituted a denial of due process as to these petitioners so as to invalidate their orders to report for civilian work in lieu of induction into the armed forces.

REGULATIONS INVOLVED

The pertinent Selective Service Regulations [E. O. 9979, 13 F. R. 4177, 4179; 14 F. R. 5021] provided:

> § 1604.41 *Appointment and duties.* Advisors to registrants shall[2] be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating

[2] The regulations were changed on January 31, 1955 [E. O. 10594, 20 F. R. 735] from "shall" to "may" in order that appointments would be made only where the community situation demonstrated a need for such advisors. We have been advised that it has been the experience of many State Headquarters that the local board clerk, the Government Appeal Agent, and the local board members have ample time to advise registrants as to their rights and duties and to assist them in filling out questionnaires and other forms.

to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

§ 1604.71 *Appointment and duties.* (a) For each local board a government appeal agent shall be appointed by the President upon recommendation of the Governor.

* * * * *

(c) Each government appeal agent and associate government appeal agent shall, whenever possible, be a person with legal training and experience and shall not be a member of the armed forces or any reserve component thereof.

(d) It shall be the duty of the government appeal agent and in his absence or inability to act or at his direction, the duty of the associate government appeal agent:

(1) To expeditiously examine the records of registrants who have been classified by the local board [2] in order that appeals to the appeal board, when found necessary, may be filed within the time limit specified by the regulations, and to appeal, as prescribed by the regulations, from any classification by a local board which, in his opinion, should be reviewed by the appeal board.

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[2] This phraseology has been modified by E. O. 10594, 20 F. R. 735, to require examination of records brought to the attention of the agent.

(2) To attend such local board meetings as the local board may request him to attend.

(3) To suggest to the local board a reopening of any case where the interests of justice, in his opinion, require such action and to submit to the local board, with such suggestion, the information obtained by his investigation of the case which has caused him to arrive at his decision that the case should be reconsidered.

(4) To render such assistance to the local board as it may request by advising the members and interpreting for them laws, regulations, and other directives.

(5) To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters.

STATEMENT

Separate indictments were returned in 1953 in the United States District Court for the Western District of Kentucky charging petitioners, who had each been classified as I–O (conscientious objectors opposed to non-combatant service), with refusing to accept work at specified hospitals, in lieu of induction (R. R. 3–4; W. R. 3–4; S. R. 4–5). All were tried without a jury,[4] convicted and sentenced to a term of imprisonment for three years (R. R. 92–93; W. R. 71; S. R. 32–33). On appeal, the Court of Appeals affirmed (Pet. 27).

[4] Wheeler's and Rowton's trials were consolidated (R. R. 5; W. R. 5–6).

ROWTON

Rowton, who was born in 1929, filed his selective service questionnaire with his local board in Paducah, Kentucky, in October 1938 (Gov. Ex. 1, R. R. 30–34). He stated that he was not employed, and was a member of Jehovah's Witnesses preparing for the ministry (R. R. 32–33). He claimed to be a conscientious objector opposed to non-combatant service, and in November 1951 was so classified (R. R. 33–34). Form 110 (which informed him of his I–O (conscientious objector) classification and his right of appeal) was mailed to him (R. R. 34).

On December 17, 1951, pursuant to his request, he appeared in person before the local board seeking a ministerial classification (R. R. 35, 37–45). At that time, he was accompanied by a person whom the clerk of the board described to the Chairman as an attorney representing Jehovah's Witnesses (R. R. 20–21).[5] After the hearing, he was retained in the I–O classification and was so notified on Form 110 (R. R. 35). After an appeal, another Form 110, informing him of his I–O classification, was mailed to him in March 1952 (R. R. 35, 45, 46). He was ordered to report for work at a state hospital on October 29, 1952, but he refused (R. R. 49–51, 57).

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[5] In accordance with Section 1624.1 of the Regulations, this man was not permitted to appear with Rowton before the Board as counsel (R. R. 20–21).

In October 1952, Rowton submitted information to the local board that he was licensed to perform marriages as a minister of Jehovah's Witnesses (R. R. 52–53). That information was submitted by the local board to state headquarters which replied that it did not consider the evidence sufficient to warrant a reopening of petitioner's case (R. R. 53–55).

On December 17, 1952, at the local board's direction, Rowton appeared before the board and was advised of the consequences of failure to obey its order, but stated that the order would interfere with his ministerial work. He was allowed to submit additional evidence in support of his position (R. R. 57–62). He was again ordered to report to a state hospital for civilian work in lieu of induction (R. R. 65–66) but refused to accept such employment (R. R. 67).

On January 21, 1953, pursuant to advice from National Headquarters, the local board requested Rowton to designate three types of civilian work he would accept (R. R. 68). He refused to make any choice, saying that any such work would interfere with his ministry (R. R. 69). Another interview with the local board followed at which he maintained his position that any civilian work in lieu of induction would conflict with his ministerial duties (R. R. 69–73).

Upon advice from National Headquarters, the local board considered the evidence which had

been previously submitted by Rowton concerning his authority to perform marriages, and notified him he was retained in class I–O (R. R. 74–78). He was again ordered to report for civilian work at a state hospital in June 1953. He reported but refused to accept employment (R. R. 81–82).

At the trial, Rowton testified that just before the trial, at the instance of their counsel, he and Wheeler went to the local board. Rowton inquired if the board had a bulletin board and was told that it did not (R. R. 14, 18–19). He testified that the board did not have posted anywhere a list of advisors to the registrants, although he was not looking for an advisor (R. R. 18–19). The clerk of the local board testified [with Wheeler's testimony corroborating (W. R. 11)] that petitioners came to the board in February 1954 and merely inquired if anything was posted as to their trials (R. R. 25–26). She also testified that the board had a list of advisors to the registrants, but that the list was not posted since the advisors changed, and she usually advised the registrants verbally, if they requested the names (R. R. 26).

WHEELER

Wheeler, who was born in 1928, was registered with the same local board as Rowton. In his questionnaire, filed in October 1948 (Gov. Ex. 2; W. R. 22–26), he stated he was employed as a

machinist apprentice, and was a student for the ministry of Jehovah's Witnesses (W. R. 23–24). He claimed to be a conscientious objector, was so classified, and was notified on Form 110 (W. R. 26–27).

At his request, he was granted a personal appearance before the local board on December 17, 1951, immediately following Rowton's appearance, at which he too pressed a claim for ministerial exemption (W. R. 9, 29–31). He was retained in class I–O and so notified (W. R. 27). He appealed, was retained in class I–O, and so notified (W. R. 27, 31–32). He was ordered to report for work on October 29, 1952, but he refused (W. R. 32–37).

In December 1952, he appeared before the board at its request and was advised of the consequences of failure to report for work. He stated that the order would interfere with his ministry and was allowed to submit written evidence in support of his position (W. R. 38–43). He was again ordered to report for civilian work, but refused (W. R. 44, 49).

In January 1953, pursuant to advice from National Headquarters, the local board requested Wheeler to designate civilian work he would accept. He refused to do so and maintained his position after an interview with the board (W. R. 52–57). He was once again ordered to report for civilian work at a state hospital in May 1953.

He reported but refused to accept employment (W. R. 58–60).

He testified that, before the trial, he went to the local board with Rowton and Rowton asked if anything was posted about the trial (W. R. 11). The clerk told them there was no bulletin board as there was no need to post bulletins (W. R. 10).

STEPP

Stepp's selective service questionnaire was filed in February 1951, with local board No. 15, Hopkinsville, Kentucky. His file showed the following (Gov. Ex. No. 1, S. R. 14–19):

He was born in 1932 and was regularly employed as a termite exterminator. He stated he was a member of Jehovah's Witnesses preparing for the ministry (S. R. 14, 17) and was conscientiously opposed to war (S. R. 19). He was classified I–O and Form 110 notifying him of that classification was mailed to him (S. R. 20). Following an unsuccessful appeal, he was again classified I–O and so notified (S. R. 20, 24). After a physical examination, he was found acceptable and ordered to report for hospital work in lieu of induction (S. R. 20–21). He appeared before the local board at the appointed time, but failed to report to the hospital for work, as ordered. Subsequently, pursuant to advice from state headquarters, the local board asked him to choose the type of civilian work which he preferred in lieu of induction. He replied that he would not ac-

cept any type. Thereafter, he was interviewed by the local board as to the reasons for his refusal to accept any work, but maintained his position (S. R. 21–22). On September 29, 1953, he was ordered to report on October 9, 1953, at a sanatorium for work in lieu of induction, but he failed to do so (S. R. 23, 24–25, 26).

Stepp testified that, a few weeks prior to the trial, he found no list of advisors posted at the board and that the clerk of the board when asked about advisors said she had never heard of them and asked if he meant the appeal agent. The name of such agent, however, was not posted anywhere and the clerk told him that he was "probably" in Florida (S. R. 11–12, 13).

The chairman of the local board testified that the board does not have a list of advisors, but that the board's appeal agent acts as advisor to the registrants; that the board referred petitioner to the appeal agent; and that petitioner contacted the agent (S. R. 8–10). The record on appeal does not contain the entire trial proceedings, but the District Court said (S. R. 31) that the "record does disclose that he [petitioner] sought and was given the counsel and advice of members of the Jehovah Witnesses. As early as February 15, 1951, he was assisted in the preparation of his Selective Service Classification Questionnaire by Richard P. Ohomers, a company servant of the Hopkinsville Company of Jehovah Witnesses. Amos Glen Freeman, also a company servant,

assisted the defendant in the preparation of his conscientious objector's form."

ARGUMENT

1. Petitioners' sole contention (Pet. 2, 7–23) is that the local boards' failure to post the list of advisors to registrants resulted in a denial of due process invalidating their orders to report for civilian work in lieu of induction.[6] The function of the advisors, as set forth in Regulation 1604.41, *supra*, p. 2, is to "advise and assist registrants in the preparation of questionnaires, and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law." On these records, the failure to post the names of the advisors did not prejudice petitioners since they were fully acquainted with and were given the benefit of every avenue available to them in seeking exemptions from military service; the Court of Appeals explicitly found that there was no prejudice (Pet. 26).

In Rowton's case, he in fact had the advice of his counsel at the time of his first personal appearance before the local board. Since Wheeler came with Rowton to the local board for his personal appearance (see R. R. 9), presumably he too had the benefit of that same advice. In the case of Stepp, the local board chairman specifically

[6] There is no claim that petitioners were improperly classified.

referred him to the appeal agent, whom he contacted (see Statement, *supra*, p. 10). Moreover, each petitioner was notified more than once, when he received his Form 110, "For advice, see your government appeal agent." Petitioners' argument (Supp. Pet. 4) that the appeal agent's function is limited to appeals and not to matters before the local board, is negated by Section 1604.71 of the Selective Service Regulations (*supra*, p. 3), which provides that such agent shall protect the interests of the government and the registrant "in all matters."[7]

As is evidenced by petitioners' testimony that their inquiry concerning the posting of advisors was merely an afterthought, the failure on the part of the local board to post the list of advisors did not affect petitioners in any way in their proceedings before the boards. Accordingly, the deficiency did not render the proceedings before the boards unfair and did not vitiate the orders. See *Eagles* v. *Samuels*, 329 U. S. 304, 312; see also *United States* v. *Davidson*, 218 F. 2d 609 (C. A. 9), where this identical point was raised (reversed and remanded on another point, 349 U. S. 918; conviction reaffirmed, 225 F. 2d 836, certiorari denied, 350 U. S. 887). The failure to post a list of advisors had no more relationship to petitioners' classifications than it would to those of

[7] As noted *supra*, fn. 2, the present regulations do not require advisors.

registrants who accepted their classifications and were inducted without protest.

2. The asserted conflict (Pet. 7) between the decision below and *Chernekoff* v. *United States*, 219 F. 2d 721 (C. A. 9), does not exist since, as shown below, the Ninth Circuit has since held that the failure to post the names of advisors did not invalidate a classification. The Court of Appeals in *Chernekoff*, *id.* at p. 724, said:

> The failure of the local board to comply with the posting of names and advisors as provided by 32 Code Fed. Regs. § 1604.41, *supra*, presents another problem of due process.
>
> It was said in argument that this omission is in consonance with the practice in Los Angeles County. If that be so, we have serious doubt as to the validity of such a practice by the local boards. Suffice it here to observe that this deviation from the regulation was not affected by the action of the appeal board.

In a subsequent decision in *Uffelman* v. *United States*, No. 14,780, decided January 27, 1956, and not yet reported (see Appendix, *infra*, pp. 15–28), the same Court of Appeals, when this identical question was squarely presented to it, said that "the *passing* reference [to this issue] in the *Chernekoff* case does not control here." [Emphasis supplied.] It held in *Uffelman* that the failure to post the names was not prejudicial where, as

here, the evidence showed that the registrant was sufficiently advised by other sources. Similarly, a number of District Courts have held that the failure of the local board to appoint an advisory panel and post their names did not vitiate the proceedings before the boards. *United States* v. *Montee,* 137 F. Supp. 381 (E. D. Wis.); *United States* v. *Wenner,* 134 F. Supp. 447 (M. D. Pa.); *United States* v. *Dorn,* 121 F. Supp. 171 (E. D. Wis.); *United States* v. *Mekolichick,* unreported, decided September 29, 1955 (M. D. Pa.); *United States* v. *Manns* and *United States* v. *Thoman,* unreported, decided October 1955 (N. D. Ill), appeals pending, C. A. 7. The District Court decisions to the contrary cited by petitioners (Pet. 8; Pet. App. D) all involved situations where, unlike that here, the courts found affirmative prejudice to the registrants from the failure to post names.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

APRIL 1956.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 14780, January 27, 1956

WESLEY LAWRENCE UFFELMAN, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: MATHEWS, HEALY, and LEMMON, Circuit Judges. LEMMON, Circuit Judge.

Recognition of the privilege of conscientious objection to military service is a statutory grace, not a Constitutional right. While it is true that, implementing this grace, certain procedural safeguards have been established by statute and administrative rule, these safeguards cannot be parlayed into rigid Constitutional guarantees of a "trial" before a draft board.

In *United States* v. *Macintosh,* 1931, 283 U. S. 605, 623, the purely statutory character of this grace was spelled out by the Supreme Court in unequivocal words:

> The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him.

When, as here, a draft registrant chooses to be indicted rather than inducted, he can clamor for only limited "rights."

1. *Statement of Facts.*

Since the appellant's legal contentions are related with especial closeness to his particular situation in the instant case, a somewhat detailed summary of the facts will be helpful.

The appellant registered with the Selective Service on September 18, 1948. He filed an eight-page Classification Questionnaire on May 2, 1949, containing, *inter alia,* the following statements:

He was born on February 11, 1930. His "occupation" was that of dairy and beef farmer. (At the time of his trial he testified that he was a hod carrier.) He stated that "I am a student preparing for the ministry under the direction of Jehovah's Witness's (sic) in a theological or divinity school." He did not claim at the time that he was either a regular or an ordained minister. He did not state what classification he should be given, at the place where such answer was invited, but he did state that he was studying "to better learn and qualify for ministry." He was single and was working forty hours a week as a farmer.

He further stated that "I am attending the Kingdom Hall of Jehovah's Witness's (sic) located at 2964- 24 street Sacramento, California." He asserted that he was a conscientious objector, and was sent the four-page Special Form for Conscientious Objectors on June 27, 1949, which he completed and returned on July 1, 1949.

On August 16, 1950, the appellant was placed into Class IV–E, at that time the classification

for the "complete" conscientious objector registrant. That classification entailed no burden or obligation that would take the appellant from his "then part-time ministry," hence he did not appeal.

On November 14, 1951, the appellant was reclassified into I–A by the Local Board. On December 11, 1951, he appeared before the Local Board and, in a statement dated December 10, 1951, claimed, *admittedly for the first time,* that he should have the IV–D minister's classification because he had become a "pioneer," or "full-time," minister. The Local Board kept him in Class I–A, and on December 20, 1951, he took an appeal. His complete file was forwarded to the appeal board on January 8, 1952.

The appellant's case was referred to the Department of Justice for inquiry and hearing with respect to the character and good faith of his conscientious objections, pursuant to Sec. 6 (j) of the Universal Military Training and Service Act (50 App. USCA Sec. 456 (j)). A hearing was held on April 8, 1952.

On July 8, 1952, T. Oscar Smith, Special Assistant to the Attorney General, recommended that the appellant's claim of conscientious objection be sustained. The Appeal Board classified the appellant in Class I–O, on July 18, 1952. At that time, the designation for a complete conscientious objector classification had been changed from IV–E to I–O.

He appealed his classification of I–O to the Presidential Appeal Board on March 17, 1953, but was put back into Class I–A by that body, on June 3, 1953.

On June 25, 1953, the appellant was ordered to report for induction, and on July 8, 1953, he refused to submit thereto.

On July 29, 1953, he was indicted, and October 23, 1953, he was acquitted of violating the Universal Military Training and Service Act.

On November 13, 1953, the appellant was reclassified in I–O. On November 19, 1953, he asked for a personal appearance before the Local Board, and he was granted such an interview on December 8, 1953. He submitted various letters and other material to support his position that he was a minister of religion. Included in that material were letters from Homer L. Hendrickson, presiding minister of the South Unit of the Sacramento Jehovah's Witnesses; Alex Uffelman, assistant presiding minister; Paul R. Halbert, Bible study servant; and Albert O. Brese. The first-named three persons signed jointly. Brese stated that the appellant was connected with "the Bible and ministerial work of Jehovah's Witnesses."

At the trial, the appellant testified that he brought Hendrickson and Brese with him to the Local Board on the occasion of his personal interview; that he asked the Board whether he might "invite them in and give testimony"; and that "they weren't allowed to come in."

The Local Board continued the appellant in Class I–O on December 10, 1953, and on January 7, 1954, the appellant was likewise classified as I–O by the Appeal Board. At that time and at the time of the trial, the appellant's position in his church was that of "advertising servant," his duty being to "take care of the magazine."

On March 9, 1954, the appellant had another personal appearance before the Local Board, at which time he stated that his work was that of a hod carrier. On April 16, 1954, the Local Board ordered the appellant to report on April 27, 1954, for institutional work at the Los Angeles County Department of Charities. It was stipulated at the trial that, although ordered to report, the appellant did not do so.

On January 19, 1955, the appellant was indicted for failure to comply with the order of his Local Board. Trial by jury was waived.

At the trial, Mrs. Lillian Z. Searle, clerk of Local Board No. 23 who was called as a witness by the appellant, was asked whether any advisers were appointed by the Board during her tenure, which commenced about January, 1952.

> Well, the Board members always act as advisors. The coordinator acts as an advisor. And there is an appeal agent that acts as an advisor. * * *

In answer to a question by the Court, Mrs. Searle stated that no "specific person otherwise" had been appointed "Advisor to Registrants."

On cross-examination, Mrs. Searle testified that the names, addresses, and telephone numbers of the Board members and of the appeal agent were placed on top of her desk; that the appellant had "never been refused any personal appearance"; that she knew of no case in which, having been "retained in a classification by a personal appearance," he had not taken an appeal; and that he had submitted material for inclusion in his file on "many occasion," and that no one had ever

refused him the opportunity to submit such material.

Colonel George R. Ferrill, described in the record as "an official of the California Selective Service System," when called as a witness for the appellant, testified on cross-examination that in California a Government appeal agent must be an attorney. His testimony on the subject of "Advisors to Registrants" was substantially the same as that of Mrs. Searle.

The appellant testified that during his classification period he had consulted from time to time with Hagen (sic) C. Covington, of New York, counsel for Jehovah's Witnesses, described in the appellee's brief as "probably the outstanding authority on Selective Service today." The appellant consulted with Mr. Covington on "that last classification" which he received—presumably the one under which he refused to be inducted and was convicted instead. Hayden C. Covington is named as counsel in eight of the cases cited in the present opinion. We have no doubt that he is the attorney referred to by the appellant.

The District Court adjudged the appellant guilty, and sentenced him to imprisonment for one year and one day. From that judgment, the present appeal has been taken.

2. *The Questions Presented.*

1. Is the failure to post the names and addresses of "Advisers[1] to Registrants" a denial of due process?

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[1] The spelling "adviser" is preferred by Webster's New International Dictionary, Second Edition (1955).

2. Is a registrant deprived of due process when, although there has been one "inquiry and hearing" by the Department of Justice, there has not been a second such "inquiry and hearing" in the case of the same registrant, who was acquitted in the first case, and who, in the second processing, is classified as a conscientious objector?

3. Was the Local Board's refusal to hear two witnesses offered by the appellant a denial of due process?

3. *The Lack of a Formally Designated "Adviser to Registrants" Did Not Amount to a Denial of Procedural Due Process.*

Section 1604.41 of Title 32 of the Code of Federal Regulations, compiled as of December 31, 1951, and effective as to facts arising on or after January 1, 1952, reads as follows:

> Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

In the Revision of Title 32 covering regulations published on or before December 31, 1954, "effective as to facts arising on and after Janu-

ary 1, 1955," and therefore not applicable here, the mandatory word "shall" in the first line has been changed to the permissive "may." This recent amendment to the Code of Federal Regulations does not seem to have been noticed by counsel, since E. O. No. 10594, incorporating a similar amendment, and cited by the appellant, changed Sec. 1604.41, according to counsel, on January 31, 1955, or thirty days *after* the effective date of the 1954 revision referred to above.

As we have seen, both Mrs. Searle and Colonel Ferrill agreed that no "Advisor to Registrants" had been appointed under the present Act. They also agreed, however, that members of the Board, the clerk of the Board, the coordinator, and the appeal agent act as advisers. Furthermore, the evidence shows that the appellant was constantly advised by Mr. Covington, one of the nation's leading authorities on the Selective Service law.

The appellant relies heavily upon our opinion in *Chernekoff* v. *United States,* 9 Cir., 1955, 219 F. 2d 721, 722, 724, in which we expressed "serious doubt" as to the "validity" of the "practice" of local boards in Los Angeles County, California, in failing to post the names of advisers, and stated that such failure "presents another problem of due process." But the passing reference in the *Chernekoff* case does not control here. There no showing was made that the registrant had available the battery of "advisers" that were ready to assist the appellant in the instant case. Counsel in the instant case agreed that the "label" given to such advisers is not important, so long as the registrant is assured of ready and

sound advice. The record here establishes beyond cavil that the appellant was so assured.

In *Eagles* v. *Samuels*, 1946, 329 U. S. 304, 312, a Selective Service case, the Court said:

> If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair (Case cited), or that there was no evidence to support the order (Case cited), the inquiry is at an end.

This Court, in another Selective Service case, adhered to the principle "that procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded." *Knox* v. *United States*, 9 Cir., 1952, 200 F. 2d 398, 401.[2]

Since no prejudice is shown to have resulted from the Local Board's failure to have the Director of Selective Service to appoint "advisers to registrants" and its consequent failure to post the names of such advisers in its office, we hold that there is no merit to this first "question" presented by the appellant.

4. *The Appellant Was Not Deprived of Due Process by Not Being Given A Second Department of Justice Hearing.*

As we have seen, the appellant's case was referred to the Department of Justice for inquiry and hearing during the course of the proceedings in his first case, which resulted in his acquittal.

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[2] See also *Martin* v. *United States*, 4 Cir., 1951, 190 F. 2d 775, certiorari denied, 1951, 342 U. S. 872; *United States* v. *De Lime III*, 3 Cir., 1955, 223 F. 2d 96, 101; *United States ex rel McCarthy* v. *Cook*, 3 Cir., 1955, 225 F. 2d 71, 73.

The appellant concedes, as indeed he must, that "The file shows that in the eight months between his reclassification by the local board and his reclassification by the appeal board, the FBI investigated his current status, a Hearing Officer of the Department of Justice *interviewed him at length* and the Attorney General made a recommendation, based on the foregoing, to the appeal board." [Emphasis supplied.] The Attorney General's recommendation was that the appellant's claim of conscientious objection should be sustained, and, as already noted, the Appeal Board followed the recommendation and classified the appellant in I–O, on July 18, 1952.

The appellant complains, however, that "In 1953, when appellant was given another administrative appeal (from the December (November) 10, 1953, notice that he was retained in the undesired I–O classification) he *was not* given the 'special appellate procedures' to aid in determining his current status but was promptly reclassified in the same Class I–O by the appeal board on January __, 1954."

The appellant relies heavily upon the case of *Sterrett* v. *United States,* 9 Cir., 1954, 216 F. 2d 659, 663–665, which has been followed by this Court in *Blevins* v. *United States,* 9 Cir., 1954, 217 F. 2d 506, 508–509, and in *Shepherd* v. *United States,* 9 Cir., 1954, 217 F. 2d 942, 946. The *Sterrett* case, however, can be distinguished on its facts from the one at bar. In *Sterrett,* the Department of Justice returned the registrant's files to the Appeal Board without conducting a hearing because it construed Section 6 (j) of the Universal Military Training and Service Act, as

amended, 50 USCA App. Sec. 456 (j), to mean that the Department could assume jurisdiction only "if such claim *is not sustained* by the local (draft) board. * * * 216 F. 2d at page 662. The opinion thus summarized the Government's position:

> Says the Government: the appellant whose claim had been sustained by the local board, was not appealing *for* a conscientious objector classification but appealing *from* a conscientious objector classification for in each of these cases the registrant was claiming classification as a minister entitled to be classified in Class IV–D. (Page 662.)

In *Sterrett,* the Court stated the two appellants' position as follows:

> Appellant (sic) urges therefore that the words in Sec. 6 (j) reading: "Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing," must be construed to mean that whenever an appeal presents the conscientious objection question to the appeal board, it must refer the claim to the Department of Justice.

This Court concluded its opinion in the following language:

> In view of what we here hold not only was the Department of Justice in error in refusing to hold a hearing but so much of the Regulation as would purport to deny such a hearing to these registrants was itself unauthorized by the statute. (Page 665.)

The judgments in the two cases were reversed.

In the instant case, however, the appellant, as we have seen, concedes that he was given the full "special appellate procedures" in his first case, in which he was acquitted. He even carefully spells out the various steps in the Department's investigation and recommendation. And the appellant likewise concedes that after his acquittal in the first case, he was placed into Class I–O, as a "complete" conscientious objector.

We do not read *Sterrett* to teach that, no matter how many appeals a registrant may choose to take, even, as here, from a *favorable* action by the Local Board, he may demand, as of right, a succession of Departmental hearings, *ad infinitum*. Not even Jehovah's Witnesses should be permitted to monopolize the time and efforts of the Department of Justice!

5. *The Appellant's Statutory or Constitutional Rights Were Not Violated by the Local Board's Refusal to Hear His Witnesses.*

The appellant testified that two of his prospective witnesses before the Local Board "weren't allowed to come in." Although the appellee suggests that the record on this point is "somewhat ambiguous," the appellant's statement just quoted was not contradicted, and for the purposes of this appeal we accept it as true.

Nevertheless, a refusal by a Local Board to hear a registrant's proffered witnesses is not a violation of his Constitutional or statutory rights. Proceedings before a Selective Service Board are not a trial. In *United States* v. *Nugent*, 1953, 346 U. S. 1, 8, Mr. Chief Justice Vinson said:

> The registrant must first look to his local board for the relief he claims; he must convince this body—composed of representatives of his community—of the depth and sincerity of his convictions. He must fill out forms, calculated to put him to the test; he must supply any additional detailed information which may be necessary for a searching investigation of his claim; and if he or his local board demands it, he may appear in person to explain his position to the persons charged with determining its validity.

The last Chief Justice then cited, with apparent approvel, 32 CFR (1949 ed.) part 1624, *the very first section of which* contains the following sentence, conveniently ignored by the appellant:

> 1624.1 *Opportunity to appear in person.*
>
> * * * * *
>
> (b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, *in its discretion,* permit any person to appear before it with or on behalf of a registrant: * * * [Emphasis supplied.]

In his brief, the appellant insists that "It is unquestionable that the regulation gives the registrant, appearing before the local board the right to discuss, point out, etc., etc. Sec. 1623.2 (b) so provides." The section to which the appellant refers, however, deals *exclusively* with the *registrant's* appearance before the board: it in no way relaxes the provision of Section 1624.1, to the effect that "No person other than a registrant shall have the right to appear in person before the local board," etc.

Similarly, the case of *Davis* v. *United States*, 6 Cir., 1952, 199 F. 2d 689, stressed by the appellant, deals *exclusively* with the registrant's right to appear in person before the local draft board, which right, of course, was freely given to the present appellant. The matter of a registrant's *producing witnesses before the board* is not mentioned in *Davis*, and the case is therefore not in point.

The two "mature" men whom the appellant offered as witnesses were Hendrickson and Brese. As we have seen, however, both these men, together with others, had written letters in the appellant's behalf, which unsworn statements had been submitted to the Local Board. Such unsworn statements could be and were considered by the Board. The appellant was therefore not prejudiced by not being permitted to have those men appear before the Board in person.

6. *Conclusion.*

After a careful examination of the transcript of the trial in the court below and a minute scrutiny of the voluminous exhibits presented to the Local Board and the Appeal Board, we are of the opinion that all the appellant's Constitutional, statutory, and administrative rights have been duly safeguarded.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Jan. 27, 1956.

PAUL P. O'BRIEN, *Clerk.*

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 806

PAUL EDWARD ROWTON, CHARLES FREELAN WHEELER and REUBEN JONES STEPP, Petitioners

v.

UNITED STATES OF AMERICA

ON JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Authorities Cited

	PAGE
Rules of the United States Court of Appeals for the Sixth Circuit	2
Uffelman v. United States 230 F. 2d 297 (9th Cir., 1956)	7
United States Constitution, Amendment VI	6

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MAY IT PLEASE THE COURT:

The brief of the United States in opposition will be responded to *seriatim.*

I.

The suggestion in footnote 2 on page 2 of the brief for the United States that clerks, appeal agents and local board members "have ample time to advise registrants" is a factual statement entirely out of the record. There is no such proof in any of these records, and even if there were such proof it would not be adequate to overcome the specific mandate of the regulations fixing the responsibility for the help of

registrants, not on the clerk, the appeal agent or the board members, but upon the local board advisors.

II.

On page 5 in the statement of facts in the Rowton case mention is made of the attorney who accompanied Rowton to the hearing but who was denied the right to enter and assist him. The record in this case shows that Rowton was not allowed to have the assistance of counsel at the hearing. There is no other evidence anywhere in the record that he did receive the assistance of an attorney in the preparation of any of his papers. The first personal appearance was long before the final order to report for induction. It was long after the papers had been prepared by Rowton in 1951. There is no presumption that the attorney that appeared with him at the personal appearance and was denied the right to assist him there helped him with the preparation of his papers about a year or two before. There is a very strong presumption of innocence that the Government failed to overcome. The burden was on the Government to show that the attorney accompanying Rowton helped him prepare his papers. The failure thus to prove that Rowton received such assistance is not equivalent to nullifying the failure to provide the mandatory assistance demanded by the regulations.

III.

On page 10 of the Government's brief the statement is made that the record in the Stepp case does not contain the entire trial proceedings. This statement is inaccurate. The entire typewritten transcript does contain all of the proceedings. Under the rules of the United States Court of Appeals for the Sixth Circuit the appellant is permitted to print an appendix. The Government did not see fit to

print any additional part of the typewritten transcript of the proceedings. It is therefore plain that this statement made by the Government is inaccurate.

IV.

The Government makes the statement on page 11 of its brief that the failure to post the names of advisors did not prejudice petitioners since "they were fully acquainted with and were given the benefit of every avenue available to them." This statement of the Government is entirely unsupported by any proof or testimony. It is pure speculation on the part of the Government and is made solely for the purpose of prejudicing this Court against the petitioners in these cases by suggesting that the petitioners had every help possible for them to receive. There is no such proof of any assistance whatever. The burden of proof was upon the Government to establish that there was harmless error. Once the petitioners establish that the Government failed to comply with the regulations by failing to post the names and addresses of advisors to registrants the responsibility shifted to the Government to prove that the petitioners had every assistance possible in the preparation of their papers. The Government at no time attempted to offer any evidence whatever on this point. There was no cross-examination of the petitioners to establish that they did receive any assistance whatever. This argument made here is entirely speculative and wholly unsupported by any facts or the record. It is a mere assertion by the Government to overcome wholly its failure to discharge the burden of proof put upon it by the proof made by the petitioners that the Government had violated the law in failing to post the names and addresses of the advisors to registrants.

V.

It is stated on page 11 that the Court of Appeals "ex-

plicitly found that there was no prejudice." While this was a holding of the Court of Appeals, it was entirely erroneous, being unsupported by any evidence, the same as is the assertion of the Government in its brief. The holding of the court is unsupported by proof, as is pointed out in the petition for writ of certiorari.

VI.

The Government states on page 11 of the brief that Rowton "had the advice of his counsel at the time of his first personal appearance before the local board." This statement is made contrary to the record. At the time of his first personal appearance before the local board Rowton was denied the assistance of his counsel and this statement made by the Government flies in the face of the record itself. There is absolutely no proof whatever that Rowton had any counsel before his personal appearance. At his personal appearance, even though he engaged counsel, he was denied the assistance of counsel. The burden was upon the Government to prove that he had assistance of counsel at other times and, since the proof showed that he was denied assistance of counsel at the personal appearance and there is no proof that he had assistance of counsel when he was before the board at any other time or when he prepared his papers, it is entirely speculative and contrary to the record to make this assertion.

VII.

It is stated also that Wheeler came with Rowton to the local board and "presumably he too had the benefit of that same advice." What is said above also applies here. Wheeler is, moreover, in a much better position because there is no proof that the attorney that appeared at the board in behalf of Rowton came in behalf of Wheeler. The chairman of the local board said the attorney came in behalf of Rowton. The fact that Rowton had counsel does not mean to say that Wheeler had counsel at the time of

the personal appearance. But, in any event, if Wheeler did have counsel it would have done him no good because he was denied the assistance of counsel at the personal appearance. This statement made by the Government, that Wheeler presumably had the benefit of counsel, flies in the face of the burden placed upon the Government to prove that he did have assistance of counsel. There is a presumption of innocence that is much stronger than any speculative argument that can be made by the Government that Wheeler was assisted by Rowton's counsel.

VIII.

Concerning the argument of the Government that the petitioners, Rowton and Wheeler, were assisted by counsel at the personal appearance, it should be remembered that the Government at no time undertook to discharge the burden of proof placed upon it, to establish that Rowton and Wheeler had the assistance of counsel in the preparation of their papers. The only time the record shows that there was any counsel in the case was when Rowton took the counsel with him to the local board, but such counsel was denied the right to appear with him before the local board as he requested. The Government, having failed entirely to discharge its burden of proof that Rowton and Wheeler were assisted by legal counsel in the preparation of their papers, cannot speculate. Such argument is repelled by the presumption of innocence and the burden of proof upon the Government to prove the elements required beyond a reasonable doubt.

IX.

At the bottom of page 11 and the top of page 12 of its brief the Government argues that Stepp was referred by the chairman to the appeal agent. Then reference is made back to the statement of facts appearing on page 10 of the brief. There it is stated that Stepp was referred to the appeal agent. This is not a correct interpretation of the

facts. The testimony of the chairman was entirely general and related to a distinction between the appeal agent and the advisor to registrants. (See the record in the Stepp case at pages 8-10.) At the top of page 10 the chairman testified that they offered Stepp the services of the appeal agent, but this was not at the time following the classification. (See the recital of the facts made by the petitioner at pages 6-7 of the petition for writ of certiorari.) This conference was after the case had been decided by the appeal board and returned to the local board. At such time it was impossible for Stepp to take an appeal. It is plain therefore that the statement made by the Government in its brief is extremely misleading and contrary to the record.

X.

It is stated by the Government on page 12 that the question presented about the failure to post the names and addresses of advisors to registrants was raised at the trial by the petitioners which was "merely an afterthought." This is true. At the time the petitioners were registrants before the local boards and their cases were being processed in the Selective Service System they were wholly unaware of the right to have assistance of advisors. The first they learned about it was upon the trial and this was just a few days before the trial. It is true it was an afterthought but this certainly does not remove any of the strength of the point presented by the petitioners. If this argument made by the Government had any validity, then it would be impossible for any prisoner who is confined in the penitentiary without representation of counsel in violation of the due process clause and the Sixth Amendment to seek release upon habeas corpus, because in every case when the prisoner discovered it after his incarceration it would be "merely an afterthought." Such name calling by the Government in this case is wholly without merit and ought to be rejected as frivolous.

XI.

It is stated on page 12 that the failure to post names of advisors to registrants did not affect "petitioners in any way in their proceedings before the board." This statement is absolutely incorrect. While perhaps it would not have resulted in a better classification, the fact of the matter is that it was a violation of procedural due process. It is irrelevant that a registrant has no good case when it is shown that there is a denial of procedural due process of law.

XII.

It is also stated again at the bottom of page 12 that the failure to comply with the law "had no more relationship to petitioners' classifications than it would to those of registrants who accepted their classifications and were inducted without protest." (Brief, pp. 12-13) This is entirely irrelevant. There are many cases where registrants have submitted to induction voluntarily but who have been discharged because of a violation of their procedural rights. It is fundamental that, even though a registrant does not have a bona fide claim for exemption, the denial of his procedural rights is grounds for a discharge from the armed forces on a writ of habeas corpus.

XIII.

Uffelman v. *United States*, 230 F. 2d 297 (9th Cir. 1956), cited at the bottom of page 13 and printed as an appendix to the brief for the Government, is not in point. It has been distinguished.—See the petition for writ of certiorari at pages 7-8.

XIV.

The effort to distinguish the cases on page 14 of the Government's brief fails. While the cases there held that

there was prejudice, this does not prove that the law requires a showing of prejudice by the petitioners. When petitioners showed a violation of the regulations, the burden shifted to the Government to prove no prejudice and the Government failed to discharge its burden of proof. Thus the suggestion made at the bottom of page 14 is irrelevant and immaterial.

CONCLUSION

It is respectfully submitted that the joint petition for writ of certiorari should be granted.

Respectfully submitted,

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April, 1956.